IN THE COURT OF APPEALS OF IOWA

No. 0-205 / 09-0523
Filed June 16, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILSON MARTRAVIS HUDSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom (probation violation) and Carla T. Schemmel (adjudication of guilt and sentencing), Judges.

Wilson Hudson appeals district court orders finding violations of probation, revoking his deferred judgment, and imposing a prison sentence on a charge of possession of crack cocaine with intent to deliver. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephan K. Bayens, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ. Sackett, C.J., and Tabor, J., take no part.

VAITHESWARAN, P.J.

Wilson Hudson appeals district court orders finding violations of probation, revoking his deferred judgment, and imposing a prison sentence on a charge of possession of crack cocaine with intent to deliver. He contends the court (1) violated his constitutional right to procedural due process by providing only cursory findings for the probation violations and (2) failed to conduct a proper sentencing hearing in violation of Iowa Rule of Criminal Procedure 2.23(3).

I. Background Proceedings

Hudson entered an *Alford*[1] plea to possession of crack cocaine with intent to deliver. The district court deferred judgment and sentencing contingent on his successful completion of two years of probation. The court ordered Hudson to pay restitution, court-appointed attorney fees, applicable surcharges, and a civil penalty. Hudson was further ordered to complete a substance abuse evaluation, follow through with all recommended treatment, and obtain his GED.

Hudson did not comply with the conditions of probation. As a result, the Department of Correctional Services filed a probation violation report alleging several violations. Hudson stipulated to the violations. He was ordered to a residential correctional facility where he was the subject of several disciplinary reports.

Shortly after his discharge from the facility, the department filed a second probation violation report alleging that Hudson failed to (1) maintain employment,

[1] An *Alford* plea is a variation of a guilty plea in which a defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970) (holding Constitution does not bar sentence where accused is unwilling to admit guilt but is willing to waive trial and accept sentence).

(2) make payments towards his court-ordered financial obligations, (3) work towards his GED, and (4) attend a class required by his probation officer. The report sought revocation of Hudson's deferred judgment and imposition of a suspended sentence.

Just two months after the report was filed, it was supplemented with an allegation that Hudson assaulted his former girlfriend. Based on this new information, Hudson's probation officer changed her recommendation to imposition of a prison term rather than a suspended sentence.

Before a hearing could be held on the second report and supplemental filing, Hudson's probation officer filed another supplemental report alleging that Hudson missed a court hearing and failed to attend an appointment with her.

Following an evidentiary hearing, the district court ruled that Hudson violated the terms of his probation. The court stated:

> As to the report of violations, based on the evidence presented here today, I find that the State has proven the violations alleged in the additional report of violations and the two addendums thereto. The defendant's testimony was not credible. It was very inconsistent. And the Court finds that the violations have been established as set forth in the reports of violation.

In a written order that followed, the court stated it found "by a preponderance of the evidence that the defendant has violated the terms and conditions of his probation as alleged and that a violation of probation has been established pursuant to Iowa Code Section 908.1 (2005)."

The case proceeded to a hearing before a different judge on adjudication of guilt and sentencing.[2] After the hearing, the court informed Hudson that his probation would be revoked and a written sentencing order would issue. A written order followed, revoking Hudson's deferred judgment, adjudging him guilty of possession of crack cocaine with intent to deliver, and sentencing him to a term of imprisonment not to exceed ten years. Hudson appealed.

II. Finding of Violations of Deferred Judgment Probation

As noted, Hudson contends the district court's cursory ruling at the first hearing violated his procedural due process rights. The State counters that Hudson did not preserve error on his due process challenge and, accordingly, we must review the issue under an ineffective-assistance-of-counsel rubric. We agree with the State.

As a preliminary matter, we note that the record is adequate to decide rather than preserve Hudson's claim that trial counsel was ineffective in failing to object to the brevity of the district court's findings that he violated the terms of his deferred judgment probation. *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). To prevail, Hudson must show his attorney breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The claim may be resolved on either ground. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We elect to address

[2] Some confusion naturally results from the practice of treating the State's application to revoke a deferred judgment and for adjudication of guilt and sentencing as an application to revoke the probation required as a condition for a suspended sentence. Where the terms of probation are the condition for the deferred judgment, Iowa Code sections 907.1 and 907.3 (2005) apply, although the court is permitted to "proceed as provided in chapter 908" (governing violations of probation and parole) if the deferred judgment probation is violated. Iowa Code § 907.3(1).

the prejudice ground. The test for prejudice under an ineffective-assistance-of-counsel claim is whether "'it is reasonably probable that the result of the proceeding would have been different.'" *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (quoting *State v. Schaer*, 757 N.W.2d 630, 638 (Iowa 2008).

Hudson maintains that he was prejudiced as follows: "The district court's actions cannot be reviewed because the record does not contain the district court's factual basis for finding [he] had violated the terms of his deferred judgment." This argument would be more appealing if Hudson were also challenging the sufficiency of the evidence supporting the findings that he violated the terms of his probation. *See State v. Kirby*, 622 N.W.2d 506, 510–11 (Iowa 2001) (addressing both the adequacy of the court's findings in revoking probation and whether sufficient evidence supported that decision). He is not.[3] It follows that he cannot show he was prejudiced by the claimed inadequacy of the court's findings.

III. Adjudication of Guilt and Sentencing

Hudson argues that the district court did not comply with the rules of criminal procedure governing sentencing. Those rules apply because the entry of a sentence after a probation revocation is "the final judgment in the criminal case and not part of the civil revocation proceeding." *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994). Accordingly, a district court must comply with the rules of criminal procedure when imposing a sentence, whether the defendant's

[3] Hudson does argue that the "failure to pay court costs and probation fees cannot be a basis for the findings of violation of the terms of the deferred judgment." Even if this argument could be viewed as a challenge to the sufficiency of the evidence supporting the court's findings, Hudson violated the terms of his deferred judgment probation for several additional reasons, none of which are challenged.

conviction and sentencing have been deferred, as was the case with Hudson, or whether the defendant was previously sentenced and is before the court for revocation of probation. *Id.*; *see also State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999) ("[A] district court must comply with the rules of criminal procedure when imposing a sentence after revoking probation."). We look to Iowa Code section 901.6 and Iowa Rule of Criminal Procedure 2.23(3) to determine whether the district court afforded Hudson the mandatory procedural requirements of sentencing. Our review of this issue is for an abuse of discretion. *Duckworth*, 597 N.W.2d at 800.

Hudson first maintains that the district court did not ask whether there was any legal cause why judgment should not be pronounced. *See* Iowa R. Crim. P. 2.23(3)(*a*) ("When the defendant appears for judgment, the defendant must be . . . asked whether the defendant has any legal cause to show why judgment should not be pronounced against the defendant."); s*ee also* Iowa Code § 901.6 ("If judgment is not deferred, and no sufficient cause is shown why judgment should not be pronounced and none appears to the court upon the record, judgment shall be pronounced and entered.").

The district court was not required to ask this precise question. *See State v. Craig*, 562 N.W.2d 633, 634–35 (Iowa 1997) ("Insofar as Craig's claim is based on the court's failure to specifically ask this question, his argument lacks merit. This court has previously emphasized that the words used by a sentencing court to offer the defendant a right to allocution need not duplicate the language of section [901.6] (now rule [2.23](3)(*a*)."). However, rule 2.23(3)(*a*) and section 901.6 require the court to engage in a colloquy with the

defendant about sentencing. This inquiry reflects a historical concern with the mental status of a criminal defendant at the time of imposition of sentencing. *See State v. Stallings*, 658 N.W.2d 106, 111 (Iowa 2003) (finding an in-court colloquy may bring to light further issues regarding defendant's mental status and capabilities), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). The inquiry is part of a two-step process: "First, the court orally enters a pronouncement of the sentence on the record in the presence of the defendant, giving the court's reasons for the sentence. Second, the court files a written judgment entry." *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995) (citations omitted). It is undisputed that the district court did not engage Hudson in such a colloquy about sentencing.

Hudson next contends the court did not afford him an opportunity to speak in mitigation of his punishment. Rule 2.23(3)(*d*) provides that, before pronouncement of judgment, "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." Contrary to Hudson's assertions, the district court invited Hudson to address the court either in a question-and-answer format or in narrative form, as his counsel asked: "Mr. Hudson, would you rather take the stand and have me ask you questions, or would you rather remain here and make whatever statement you want to the court today on the issue of sentencing?" Hudson responded that he "would rather make a statement to the court." Hudson then addressed the court at length about his desire to avoid prison, his search for employment, his family obligations, and his attempt to comply with the conditions of his probation. He was given ample opportunity to

volunteer any information helpful to his cause, which is all that the rules require. *See Craig*, 562 N.W.2d at 635.

Hudson finally argues that the district court did not "state on the record its reason for selecting the particular sentence," as required by rule 2.23(3)(*d*). After listening to counsels' arguments and Hudson's statement, the district court stated:

> Sir, I am going to revoke your probation. And I will tell you, there's nobody in the room that wants you to go to jail; but you have left the court no choice. You committed a felony . . . and you were given a deferred judgment which, I have said in this courtroom, I'm sure most judges feel like is basically a gift.
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> . . . You appeared in front of me and had a violation [in February 2008]. And I gave you the resources—all of them that we had available—to try to get you straight. You went to Mount Pleasant, and then you went to the Fort Des Moines, in the hopes that you could learn to not only stay away from the drugs but abide by the rules. And, unfortunately, that didn't work.
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> You can't go out of state without calling your probation officer. You can't. I mean, that's just bottom line. And I think you knew that. One call to your PO and "My grandmother is dying; I need to go," and we might not be here today for this.
>
> I don't know what happened with your girlfriend. Judge Ovrom found that there was a violation, and she heard all that evidence, and I have to respect that. But even I will tell you, in this court, going out of state without permission and without telling somebody, even in an emergency situation, is sufficient to revoke your probation. So that's the ruling of the court.

As noted, Hudson was not informed orally of the term of his incarceration, except to be informed that his probation was revoked. *See Hess*, 533 N.W.2d at 528 ("[W]here there is a discrepancy between the oral pronouncement of sentence and the written judgment and commitment, the oral pronouncement of sentence controls."). We conclude the district court's statements at the second hearing in support of its sentence may have complied with rule 2.23(3)(*d*) if there had been a pronouncement of the sentence on the record in the presence of Hudson to

give context to the reasons. *See Kirby*, 622 N.W.2d at 511. There was no such pronouncement of sentence.

We affirm the findings of probation violations and the revocation of Hudson's deferred judgment, but we remand for sentencing consistent with Iowa Code section 901.6 and Iowa Rule of Criminal Procedure 2.23(3).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.